(1) Supreme Court, U.S.
FILED
11108 JAN 10 2002
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

ROBERT R. KRILICH, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

LAWRENCE C. MARSHALL
357 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-7412

JAVIER H. RUBINSTEIN
Counsel of Record
MICHAEL A. SCODRO
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

6288

QUESTIONS PRESENTED

(1) Whether the Sentencing Guidelines permit a court to enhance a defendant's sentence based on hypothetical facts and without requiring the Government to prove the facts upon which the enhancement is based.

(2) Whether a court of appeals may limit a district court's discretion to identify "extraordinary" cases appropriate for downward sentencing departures by creating new eligibility criteria that are not mentioned in the Sentencing Guidelines, and by foreclosing consideration of factors not prohibited by the Guidelines.

RULE 29.6 STATEMENT

Petitioner Robert R. Krilich is a private party.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 9

ARGUMENT 11

I. THE SEVENTH CIRCUIT'S ENHANCEMENT OF PETITIONER'S SENTENCE BASED ON A HYPOTHETICAL "BENEFIT" CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS . 11

II. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH *KOON* AND DECISIONS OF OTHER COURTS OF APPEALS BY RESTRICTING THE DISCRETION OF SENTENCING COURTS TO ORDER DOWNWARD DEPARTURES IN "EXTRAORDINARY" CASES 16

TABLE OF CONTENTS-continued

Page

III. THIS CASE PRESENTS AN IMPORTANT OPPORTUNITY FOR THE COURT TO BRING NEEDED CLARITY AND CONSISTENCY TO THE APPLICATION OF THE GUIDELINES AS A WHOLE 24

CONCLUSION 26

TABLE OF AUTHORITIES

Cases: **Page**

Braxton v. United States, 500 U.S. 344 (1991) 24

Buford v. United States, 121 S. Ct. 1276 (2001) 17, 24

Koon v. United States, 518 U.S. 81 (1996) ..... *passim*

Neal v. United States, 516 U.S. 284 (1996) 25

Stinson v. United States, 508 U.S. 36 (1993) 25

United States v. Albarran, 233 F.3d 972 (7th Cir. 2000) .. 19

United States v. Altman, 48 F.3d 96 (2d Cir. 1995) 22

United States v. Baron, 914 F. Supp. 660 (D. Mass. 1995) 20

United States v. Comer, 93 F.3d 1271 (6th Cir. 1996) ... 14

United States v. Evans, 155 F.3d 245 (3d Cir. 1998) 15

United States v. Font-Ramirez, 944 F.2d 42 (1st Cir. 1991) 15

United States v. Gaitan-Acevedo, 148 F.3d 577 (6th Cir. 1998) 15

United States v. Hernandez, 218 F.3d 272 (3d Cir. 2000) 15

United States v. Hilton, 946 F.2d 955 (1st Cir. 1991) 23

United States v. Krilich, 159 F.3d 1020 (7th Cir. 1998) 2, 3, 5

TABLE OF AUTHORITIES-continued

Page

United States v. LaBonte, 520 U.S. 751 (1997) 25

United States v. Lacy, 99 F. Supp. 2d 108 (D. Mass. 2000) 23

United States v. Long, 977 F.2d 1264 (8th Cir. 1992) 20

United States v. Martinez, 207 F.3d 133 (2d Cir. 2000) 22

United States v. Martinez-Guerrero, 987 F.2d 618 (9th Cir. 1993) 22, 23

United States v. Martinez-Villalva, 232 F.3d 1329 (10th Cir. 2000) 15

United States v. McClean, 822 F. Supp. 961 (E.D.N.Y. 1993) 20

United States v. Mendoza, 121 F.3d 510 (9th Cir. 1997) .. 23

United States v. Neadle, 72 F.3d 1104 (3d Cir. 1996) 15

United States v. Ortega, 94 F.3d 764 (2d Cir. 1996) 15

United States v. Paradies, 14 F. Supp. 2d 1315 (N.D. Ga. 1998) 20

United States v. Persico, 164 F.3d 796 (2d Cir. 1999) ... 22

United States v. Rabins, 63 F.3d 721 (8th Cir. 1995) 23

United States v. Russell, 156 F.3d 687 (6th Cir. 1998) ... 23

TABLE OF AUTHORITIES-continued

Page

United States v. Sherman, 53 F.3d 782 (7th Cir. 1995) ... 19

United States v. Slater, 971 F.2d 626 (10th Cir. 1992) ... 24

United States v. Van Brocklin, 115 F.3d 587 (8th Cir. 1997) 10, 14

United States v. Washington, 115 F.3d 1008 (D.C. Cir. 1997) 15

United States v. Watts, 519 U.S. 148 (1997) 25

United States v. Wilson, 993 F.2d 214 (11th Cir. 1993) .. 15

Williams v. United States, 503 U.S. 193 (1992) 24

Rule:

Supreme Court Rule 10(c) 22

Miscellaneous:

132 Cong. Rec. 14919 (1986) 12

Patricia S. Corwin, *Senioritis: Why Elderly Federal Inmates Are Literally Dying to Get Out of Prison*, 17 J. CONTEMP. HEALTH L. & POL'Y 687 (2001) 20

Joint Comm. on Taxation, General Explanation of the Revenue Provisions of the Tax Equity & Fiscal Responsibility Act of 1982 (1982) 13

TABLE OF AUTHORITIES-continued

Page

Note, *Bedtime for [Industrial Development] Bonds? Municipal Bond Tax Legislation of the First Reagan Administration*, 48 LAW & CONTEMP. PROBS. 213 (Autumn 1985) 12

United States Sentencing Guidelines:
§ 2B1.1 1
§ 2C1.1 ..... *passim*
§ 2F1.1 ..... *passim*
§ 4B1.1 15
§ 5H1.1 ..... 2, 6, 10, 20
§ 5H1.4 ..... *passim*
§ 5H1.10 21

PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert R. Krilich, Sr. ("Krilich"), respectfully petitions for a writ of certiorari to review the judgment of the Seventh Circuit in this case.

OPINIONS BELOW

The district court imposed Petitioner's sentence in two separate unreported orders. App., *infra*, 10a-24a. The decision of the Seventh Circuit (*id.* at 1a-8a) is reported at 257 F.3d 689.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 2001. See App., *infra*, 1a-8a. On August 13, 2001, the Seventh Circuit denied Petitioner's request to rehear the case *en banc*. See *id.* at 9a-10a. By order dated November 7, 2001, this Court extended Petitioner's time to file this petition to January 10, 2002. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

At the time of Petitioner's sentencing, United States Sentencing Guideline 2C1.1(b)(2)(A) stated that "[i]f the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest, exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit)."[1/]

[1/] The Sentencing Commission amended § 2C1.1(b)(2)(A) on November 1, 2001, but this amendment—which requires use of the table only in cases with more than $5,000 of benefit or loss—is immaterial to the instant petition. The table formerly included as part of § 2F1.1 was also amended and is now part of § 2B1.1. Moreover, as explained *infra* at p. 5, the district court applied an earlier iteration

United States Sentencing Guideline 5H1.1 provides, in pertinent part, that: "Age (including youth) is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. Age may be a reason to impose a sentence below the applicable guideline range when the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at § 5H1.4."

United States Sentencing Guideline 5H1.4 provides, in pertinent part, that: "Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. However, an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range; *e.g.*, in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment."

STATEMENT

1. Petitioner was convicted of paying bribes to induce the City of Oakbrook Terrace, Illinois to issue Industrial Revenue Bonds (IRBs). *United States v. Krilich*, 159 F.3d 1020, 1024 (7th Cir. 1998). Congress created the IRB program to permit municipalities to stimulate the construction of various projects that advance societal goals, including construction of low and moderate income housing, that otherwise would not be built under market conditions. Tr. 1/31/00 at 93. Because interest income generated by IRBs is not taxable, issuers can sell the IRBs while offering a lower rate of interest than would be necessary to induce people to buy taxable bonds. Tr. 1/31/00 at 106-07, 136-37.

---

of § 2C1.1 to avoid violation of Petitioner's rights under the Ex Post Facto Clause. Use of this earlier Guideline has no bearing on the issues presented for this Court's review.

In 1985, the City of Oakbrook Terrace issued IRBs to finance Petitioner's construction of approximately 1200 housing units, 20 percent of which were set aside for occupancy by low and moderate income families. Tr. 8/22/95 at 108. Unfortunately, even with the IRB assistance, the project failed. Only 26 townhomes were built—after Petitioner invested $5 million of his own money to complete them—and Petitioner eventually lost millions more attempting to keep the project alive. Tr. 1/31/00 at 102-04, 107-08. Despite Petitioner's heavy personal losses, no other investor in the IRBs suffered any loss of his or her investment whatsoever. *Id.* at 112.

2. At Petitioner's original sentencing hearing, the Government argued that Petitioner received a "direct benefit" of $14.6 million under U.S.S.G. § 2C1.1(b)(2)(A). The Government calculated this "benefit" by claiming that Petitioner realized a "savings" between the cost of tax-exempt financing and the cost of taxable financing Petitioner hypothetically could have obtained for the same project. The Government offered no proof, however, that Petitioner ever intended to build a low-income housing project of this type in the absence of tax-exempt financing, or that such a project was conceivable. The court nonetheless found that Petitioner's "benefit" was in the $5 - $10 million range, but deserved a substantial downward departure under the Guidelines because his conduct did not cause a loss to any investors (other than himself).

On appeal, the court of appeals vacated the original sentence on the ground that the district court's benefit calculation was too vague, and remanded the case for a re-sentencing that "ascertained with more confidence . . . the starting point" of any claimed loss or benefit before any departure was considered. Krilich, 159 F.3d at 1031 (1998).

On remand, the district court increased Petitioner's sentence to 87 months, imposing a fifteen-level enhancement based on the "actual loss" of tax revenue that Petitioner's bribery

allegedly caused to the federal government.[2/] The court confirmed that Petitioner's sentence "rel[ied] *only* on the estimated *actual loss* to the government from lost tax revenue (*as opposed to the benefit to Krilich*)." App., *infra*, 12a (emphasis supplied); see also Tr. 2/11/00 at 364 (referring only to the government's "tax loss" when imposing Petitioner's sentence).

The court later revisited its analysis in light of the IRS's determination that the interest on the "tax-free" bonds at issue was actually taxable. Based on that determination, the court found that there was an "absence of an actual loss" and that "the 'actual loss' estimated by the government's expert was no longer an actual loss." App., *infra*, 14a. The district court therefore altered the basis of Petitioner's sentence, stating that, while the government suffered no tax loss, Petitioner's 87-month prison sentence would remain intact, "albeit for slightly different reasons," *id.* at 13a—this time based on the *intended* loss to the government (which was, likewise, approximately $14 million). *Id.* at 14a-17a. To reach this conclusion, the court explicitly *assumed* that the same project could have been financed originally using taxable bonds, and that Petitioner therefore intended to cause a tax loss to the government in the amount of the difference between the costs of using taxable versus tax-free bonds.

The Government's lone witness on this point (an economic expert) conceded that he too simply assumed the project could have and would have gone forward with taxable bonds. Tr. 1/28/00 at 39-41. As before, the Government offered no witness, no documentary evidence or any other proof that Petitioner ever intended, or that it was ever feasible for Petitioner, to find investors or otherwise finance a low and

---

[2/] Petitioner's sentence should have been enhanced only eight levels, not fifteen. See U.S.S.G. § 2C1.1(b)(2)(B) (requiring an automatic eight-level enhancement for bribery of a public official).

moderate-income housing project such as the Oakbrook Terrace project using any taxable form of financing.

In fact, Petitioner's witnesses (including Oakbrook Terrace's own bond counsel), testified that low-income housing projects like this one could *not* be financed on a taxable basis. Tr. 1/31/00 at 93, 136-37 (Lazar); Tr. 10/3/96 at 10 (Blust). Indeed, it was this basic economic fact that motivated Congress to permit the use of IRBs to finance low-income housing projects in the first place. See *infra* pp. 12-13.

Two weeks later, the district court *again* altered the basis for its fifteen-level enhancement of Petitioner's sentence. This time, the court was apparently motivated by concerns that the Ex Post Facto Clause prohibited any enhancement of Petitioner's sentence based on a loss to the government because the Sentencing Guidelines did not permit such enhancements at the time of Petitioner's offense conduct. The court thus transformed its finding of intended loss into a finding that Petitioner intended to receive a "benefit" by using tax-free bonds in the amount of the tax savings he realized by not using taxable financing. App., *infra*, 24a-25a. The court effectuated this transformation despite its earlier "'reluctant[] conclu[sion] that Krilich may be correct'" that he suffered a net loss on the project, and notwithstanding its earlier ruling acknowledging the difference between benefit to Petitioner and loss to the government. *Id.* at 12a, 25a (contrasting the two amounts); see also *Krilich*, 159 F.3d at 1031 (noting that loss and benefit would not be identical).

3. By the time of his re-sentencing, Petitioner's health had deteriorated dramatically. Petitioner accordingly sought a downward sentencing departure based on his advanced age and increasing infirmity. The district court considered substantial testimony and other evidence in connection with Petitioner's departure request, including more than 950 pages of medical records and testimony from multiple medical experts, including two noted Harvard-trained cardiologists, Drs. Daniel Fintel,

M.D. and Joseph Messer, M.D. C.A. Supp. R. 13-14, 18-20. The court credited testimony that Petitioner was "suffering from at least four serious physical infirmities: (1) chronic cardiovascular disease; (2) chronic peripheral vascular disease with hypertension; (3) obstructive pulmonary disease; and (4) back disease of lumbar and lumbosacral origin." App., *infra*, 18a. The expert testimony also established that Petitioner was "suffer[ing] from a major depressive disorder." *Ibid.* In addition, three medical experts indicated that the Bureau of Prisons ("BOP") had been providing Petitioner with substandard care. Tr. 10/31/00 at 11-12, 52-54, 92, 103-04; Supp. R. 11 at 2. The district court agreed, finding that, "[o]n balance, [Petitioner] has not received good medical treatment in the BOP," although the court found "no structural reason why [Petitioner] cannot receive adequate care within the BOP."[3/] 11/1/00 Supp. Statement of Reasons at 4.

Based on its findings, the district court granted Petitioner's motion for a downward departure based on his age and "physical condition" pursuant to U.S.S.G. §§ 5H1.1 & 5H1.4.[4/] The court departed downward one level for each physical

---

[3/] On appeal, the Seventh Circuit held that some of this evidence came in during an "unauthorized" sentencing hearing but that this error was harmless. App., *infra*, 5a-6a. While Petitioner rejects the position that the hearing was unauthorized, the issue has no bearing on this petition. The court of appeals did not discredit any of the district court's factual findings. Rather, the Seventh Circuit found that these findings did not justify a departure as a matter of law, and it is this holding that Petitioner challenges.

[4/] Although the district court does not cite §5H1.1, specifically, the court plainly relied on both age and physical impairment in explaining the departure (App., *infra*, 18a-19a), and the Seventh Circuit addressed it in its opinion. *Id.* at 6a, 8a. Indeed, in light of the substantive overlap between § 5H1.4, which deals with "physical impairment" and § 5H1.1, which addresses defendants who are both "elderly and infirm," Petitioner anticipates that a decision by this Court regarding the former would bear on the latter as well.

ailment and an additional level for their interaction—as "an extraordinary physical impairment" under U.S.S.G. § 5H1.4, particularly in light of Petitioner's advanced age (70 at the time of sentencing). App., *infra*, 18a-21a. The court recognized that "physical condition [of a defendant] is not 'ordinarily relevant' in determining whether a departure is warranted," but § 5H1.4 permits a departure on this ground where the ailment is "'extraordinary.'" *Id.* at 20a. Rejecting the Government's claim that Petitioner's infirmities were irrelevant because he "would suffer from them whether or not he was incarcerated," the district court found extraordinary circumstances here. *Id.* at 18a.

The district court determined, specifically, that Petitioner's "age and the number and complexity of his ailments render him unlike the 'typical' defendant who appears in this court for sentencing." App., *infra*, at 18a-19a. The court also found that Petitioner's "health issues present an unusual profile. The conditions of confinement will undoubtedly aggravate his conditions and make treatment more difficult." *Id.* at 19a. In addition, the court found that "[i]n combination with each other," Petitioner's serious medical problems "fall outside the heartland" of the Guideline, and thus reduced Petitioner's sentence from an applicable range of 135 to 168 months to a total sentence of 87 months' imprisonment. *Id.* at 21a.

4. Petitioner appealed the seven-level "benefit" enhancement of his sentence on the ground that the "benefit" found by the district court was entirely speculative and hypothetical since the Government introduced no evidence that Petitioner had any alternative but to finance the Oakbrook Terrace project using IRBs. Interest rates for taxable financing were, therefore, a meaningless baseline. Thus, Petitioner argued that the Government failed to meet its burden of proving its entitlement to the benefit enhancement as a matter of law. The Government cross-appealed from Petitioner's sentence, challenging the district court's decision to depart downward based on Petitioner's advanced age and poor health.

The Seventh Circuit affirmed the seven-level "benefit" enhancement. The court criticized Petitioner's argument that the Government could not meet its burden of justifying a loss or benefit enhancement based solely on the unsupported speculation that the Oakbrook Terrace project could have been financed using taxable bonds:

> [T]he Guidelines do not determine a wrongdoer's gain based on what-if scenarios. Imagine a bank robber who argues that, had he known about the presence of a guard, he would have robbed a grocery store instead and thus caused a lower loss. It is hard enough to tote up the gains and losses from crimes actually committed without pursuing second-best solutions, which are usually indeterminate. . . . Krilich did get access to tax-free bonds, raising $135 million that he held for 12 years. Some of this money he used for construction or consumption, and the rest he reinvested at higher interest. A similar kitty lent by investors who had to pay taxes on interest would have cost Krilich much more than what he actually paid in interest. Under the Guidelines the buck stops there.

App., *infra*, 3a-4a.

The court of appeals also reversed the district court's decision to depart downward based on Petitioner's advanced age and declining health. While the district court recognized the combined effect of Petitioner's age and poor health as a basis for departure, the Seventh Circuit held that any age-related ailments could not be considered as a basis for a departure. In the court of appeals' view, the Guidelines "put normal age-related features off limits as grounds for reduced sentences." App., *infra*, 6a. Because "many septuagenarians have conditions similar to [Petitioner's]," the court reasoned, such ailments could not render Petitioner's circumstances "extraordinary" and therefore could not support a downward departure. *Ibid.* The court of appeals held that a defendant is

only eligible for a downward departure on medical grounds if the defendant meets one of three eligibility criteria that the court of appeals announced: (1) "prison medical facilities cannot cope with" the defendant's ailment, (2) the defendant is so "bedridden" that "the physical condition itself does the imprisoning," or (3) "imprisonment would shorten the defendant's life span." *Id.* at 6a-7a. The court found that Petitioner did not meet any of these eligibility requirements, and that the district court thus did not have discretion to grant such a departure. *Id.* at 7a-8a. The court therefore vacated the district court's 87-month sentence and "remanded with instructions to impose a sentence in the range of 135 to 168 months." *Id.* at 8a.

REASONS FOR GRANTING THE PETITION

The Sentencing Guidelines permit courts to enhance or reduce a defendant's sentence based on proof of qualifying conduct by a preponderance of the evidence. This standard is more relaxed than the reasonable-doubt test for criminal liability, but does not permit courts to enhance a defendant's sentence based on speculation, conjecture, or hypothetical facts. The Guidelines require *proof* of the conduct at issue and of the facts necessary to justify the enhancement of a defendant's sentence. The Guidelines do not, and cannot, regard conjecture or unsupported assumptions as surrogates for proof—especially where such speculation contradicts the testimonial and documentary evidence in the record.

Petitioner received a dramatic 7-level enhancement of his sentence under U.S.S.G. § 2C1.1 and § 2F1.1 for receiving a "benefit" that all of the evidence demonstrates was entirely a fiction. The evidence at trial showed that it was senseless to compare the costs of securing tax-free versus taxable financing because taxable financing was not a feasible way to attract investors for a project that included low to moderate income housing. In fact, the outcome of the project proved why this is so, with Petitioner incurring a multi-million dollar loss on the

project.[5/] The Government never proved any other choice to exist. Instead, the courts expressly "assumed" the existence of a loss, and then accepted hypothetical calculations of Petitioner's benefit presented by the Government's economic expert in support of that assumption.

The Court should grant the petition in this case to resolve a nagging circuit split regarding the type and quantum of evidence necessary to justify the enhancement of a defendant's sentence. The Seventh Circuit in this case affirmed the district court's use of calculations that even the Government's lone witness acknowledged to be "hypothetical." The Government never offered any *actual* proof of any benefit obtained by Petitioner. Moreover, there was absolutely no evidence that Petitioner intended to build the same project using taxable financing. The Seventh Circuit thus split with the Eighth Circuit, which has held that the Government must *prove* the existence of all facts and figures used to calculate a defendant's benefit. *United States v. Van Brocklin*, 115 F.3d 587 (8th Cir. 1997). This case therefore provides an ideal opportunity to resolve this structural uncertainty in the federal courts over the evidentiary standards and requirements applicable to enhancement determinations under the Guidelines.

The Seventh Circuit's reversal of Petitioner's downward medical departure also squarely conflicts with this Court's decision in *Koon v. United States*, 518 U.S. 81 (1996). Following an emerging trend in its case law, the Seventh Circuit reversed the district court's finding that Petitioner's advanced age (now 71), infirmity, and multiple serious health problems constitute an "extraordinary physical impairment" (see §§ 5 H1.1 & 5H1.4). The Seventh Circuit held that Petitioner was ineligible for such a departure unless he fit into one of three categories that the court of appeals itself defined.

[5/] Even the district court "reluctantly conclude[d] that Krilich may be correct" that he suffered a financial *loss* on the Oakbrook Terrace project. App., *infra*, 25a (internal quotation marks omitted).

In so doing, the court of appeals transformed the comparative, fact-specific departure analysis contemplated in *Koon*—an analysis that relies on the district court's unique competence to consider all of a defendant's circumstances and compare them to what the court has seen in other cases—into a crabbed list of eligibility requirements invented out of whole cloth.

This approach—which has also found favor in the Second Circuit—dramatically limits the discretion of sentencing courts to order downward medical departures for all except those who face imminent death. Not only is this limitation inconsistent with *Koon*, but it conflicts with the rule in place in other courts of appeals.

This case presents the Court with an important opportunity to determine whether federal courts of appeals have the authority, under *Koon*, to limit the discretionary authority of sentencing courts in judging whether individual cases are sufficiently "extraordinary" to justify downward departures. The Court can use the disposition of this case to make it clear that courts many not impose additional eligibility criteria not mentioned in the Guidelines, and likewise may not prohibit consideration of factors not prohibited by the Guidelines.

ARGUMENT

I. THE SEVENTH CIRCUIT'S ENHANCEMENT OF PETITIONER'S SENTENCE BASED ON A HYPOTHETICAL "BENEFIT" CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

The Seventh Circuit held that Petitioner received a benefit under U.S.S.G. § 2F1.1 equal to the alleged tax savings of his investors. App., *infra*, 4a. In calculating this "benefit," the court subtracted the cost of tax-free financing from the greater cost of obtaining taxable financing.[6] All of the evidence,

---

[6] The sentencing court's calculation also failed to net out *any* of Petitioner's legitimate expenses from the Oakbrook Terrace

though, established that this equation was senseless because taxable financing could never be obtained for a low-income housing project such as the Oakbrook Terrace project. As such, the "benefit" upon which the sentencing court and court of appeals relied to *double* Petitioner's sentence was purely hypothetical and without any basis in reality.

Petitioner presented uncontested evidence from two witnesses that projects of this type, which include low to moderate income housing, could only be financed with tax-free bonds. For instance, Oakbrook Terrace's bond counsel testified that "the idea of Congress was you wouldn't have this kind of housing built unless there was some subsidy given for that in tax codes, like getting the other provisions here." Tr. 10/31/96 at 10; see also Note, *Bedtime for [Industrial Development] Bonds? Municipal Bond Tax Legislation of the First Reagan Administration*, 48 LAW & CONTEMP. PROBS. 213, 234 (Autumn 1985) ("The House Committee considered these [industrial development bond] projects to be particularly dependent on tax-exempt financing and singled them out for favorable treatment.").

This testimony is bolstered by the record surrounding Congress's decision to grant tax benefits to promote the development of lower-income housing in the first place—a history replete with acknowledgments that such projects are entirely dependent on tax benefits. "Congress has for years followed a conscious policy of providing special tax benefits for investors in low-income housing activities. It has done so with a very clear recognition of the fact that without such incentives, low-income housing does not offer a realistic economic return to investors." 132 Cong. Rec. 14919 (1986)

---

project. "Benefit" under U.S.S.G. § 2C1.1(b)(2)(A) is a measure of a defendant's *net* profits under an illegally obtained contract rather than his *gross* income. See U.S.S.G. § 2C1.1, App. Note 2 ("The value of 'the benefit received or to be received' means the net value of such benefit.").

(Sen. Mitchell); see also *id.* at 14922 (Sen. Cohen) ("It is precisely because the economics of low-income housing are so unattractive that the Congress has, since 1949, encouraged the goal of low-income housing for poor people through direct spending programs and tax incentives."). Accord Joint Comm. on Taxation, General Explanation of the Revenue Provisions of the Tax Equity & Fiscal Responsibility Act of 1982, at 99-100 (1982) ("Congress believed that extraordinary levels of subsidy are necessary in the case of certain types of property [including] low income rental housing").

The Government, on the other hand, offered no evidence to refute any of the foregoing evidence, or to prove that Petitioner had any choice about whether to use taxable or tax-free financing for the Oakbrook Terrace project. The Government's lone witness (an economic expert) did nothing to refute overwhelming evidence that financing of low-income housing projects such as Oakbrook Terrace are feasible *only* on a tax-free basis, such that the government has no real expectation of tax revenues on such projects. The Government's witness, David Ross, admitted that he had no proof that a low-income housing project of this sort could be financed using taxable bonds; he merely assumed this crucial point. Tr. 1/28/00 at 39-41. He "just calculated the consequence or the benefit to the [Petitioner] from borrowing at the tax free rate instead of the taxable rate"—a calculation that he openly admitted "*assumes* that there would have been a security offering at the taxable rate." *Id.* at 39 (emphasis supplied).

The Seventh Circuit at first seemed to acknowledge the impropriety of sentencing Petitioner based on hypothetical figures. As the court stated, "the Guidelines do not determine a wrongdoer's gain based on what-if scenarios." App., *infra*, 3a. But in its very next breath, the court inexplicably engaged in just that sort of impermissible "what-if" speculation by upholding Petitioner's enhancement under U.S.S.G. § 2F1.1 based on the *assumption* (not proof by a preponderance or any other standard) that the Oakbrook Terrace project could have

been financed using taxable bonds. This assumption ignored that which the record made clear: without IRB financing, the Oakbrook Terrace project never would have come into existence.

A. The Seventh Circuit's reasoning on this score was rejected by the Eighth Circuit in *United States v. Van Brocklin*, 115 F.3d 587 (8th Cir. 1997). The defendant in Van Brocklin was a former bank president who presided over the sale of loans to an outside company while receiving bribes from that company. The district court enhanced the defendant's sentence under U.S.S.G. § 2F1.1 by assuming that the bank's loss equaled the outside company's profits on the loan sales.

The Eighth Circuit squarely rejected the use of assumptions to enhance a defendant's sentence, and emphasized the need for *proof* of all of the facts and figures used to calculate a defendant's benefit/loss under § 2F1.1. Rather than assumptions, the court held, the district court should have relied only on proven facts: "[T]he government never established by a preponderance of the evidence what [the outside company] would have or should have paid for those loans had the sales been legitimate." 115 F.3d at 600; see also *id.* ("The evidence did not establish what [the bank] should have received on those sales in a completely legitimate transaction."). Without factual predicates for the figures used, the Eighth Circuit concluded, any loss calculation was merely hypothetical, and thus invalid. *Id.* The only acceptable course, according to the court, was to subtract the *proven* amounts paid from the *proven* amounts that would have been charged in a legitimate sale.

The Eighth Circuit's decision also accords with decisions of other courts of appeals that likewise have held that the Government cannot meet its burden of proving its entitlement to a sentencing enhancement based on assumptions or speculation. See, e.g., *United States v. Comer*, 93 F.3d 1271, 1284 (6th Cir. 1996) ("[T]he district court may not merely attribute additional conduct to the defendant based on

speculation."); *United States v. Neadle*, 72 F.3d 1104, 1112 (3d Cir. 1996) ("[T]he court must not merely speculate regarding psychological harm."); *United States v. Wilson*, 993 F.2d 214, 218 (11th Cir. 1993) ("We have previously held, however, that the district court must not speculate concerning the existence of a fact which would permit a more severe sentence under the guidelines.").

The Seventh Circuit's approach also is in clear conflict with the legion of cases decided by other courts of appeals which hold that "it is the government's burden to prove the facts supporting a sentence enhancement by a preponderance of the evidence." *United States v. Martinez-Villalva*, 232 F.3d 1329, 1333 (10th Cir. 2000). Accord *United States v. Hernandez*, 218 F.3d 272, 278 (3d Cir. 2000) ("The Government bears the burden of proving each element of § 4B1.1 by a preponderance of the evidence."); *United States v. Evans*, 155 F.3d 245, 253 (3d Cir. 1998) ("The burden, however, is on the government to prove by a preponderance of the evidence the facts in support of a sentence enhancement; the defendant does not have to 'prove the negative' to avoid the enhanced sentence."); *United States v. Gaitan-Acevedo*, 148 F.3d 577, 593 (6th Cir. 1998) ("For sentencing purposes, the government must prove by a preponderance of the evidence the amount of drugs directly attributable to the defendant . . . ."); *United States v. Washington*, 115 F.3d 1008, 1010 (D.C. Cir. 1997) ("The burden is on the government to prove facts in support of a sentence enhancement by a preponderance of the evidence."); *United States v. Ortega*, 94 F.3d 764, 767 (2d Cir. 1996) ("The government bears the burden of proving that specified conduct is relevant to the offense of conviction."); *United States v. Font-Ramirez*, 944 F.2d 42, 49 (1st Cir. 1991) ("At the sentencing, the government had the burden of proving, by a preponderance of the evidence, facts sufficient to support the sentencing enhancements.").

Under these lines of authority, Petitioner's enhancement under § 2F1.1 would have to have been reversed because the

Government never even *attempted* to prove the critical fact that underlay its proposed enhancement, *i.e.*, that the Oakbrook Terrace project could have gone forward using taxable financing. Instead, the district court and the court of appeals required proof of one only figure—the differential cost between the tax-free financing that Petitioner actually obtained and the hypothetical cost of taxable financing instead. The district court and Seventh Circuit thus relieved the Government of the need to prove an essential fact on which its requested enhancement was based.

By requiring actual proof of elements offered to enhance a sentence, this Court can ensure that defendants like Petitioner are not subjected to dramatic enhancements of their sentence (which in this case will effectively mean a life sentence to Petitioner, a 71-year old inmate) based on "benefits" that truly are nothing more than a fiction. Years of a defendant's life should not be taken without real proof.

II. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH *KOON* AND DECISIONS OF OTHER COURTS OF APPEALS BY RESTRICTING THE DISCRETION OF SENTENCING COURTS TO ORDER DOWNWARD DEPARTURES IN "EXTRA-ORDINARY" CASES.

Notwithstanding the Sentencing Commission's role in propounding and refining substantive Guideline provisions, this Court consistently has undertaken to resolve questions bearing on the standards by which appellate courts review sentencing decisions. See *infra* pp. 24-25. This case presents another significant opportunity for the court to bring needed guidance to this important area of the law. The Seventh Circuit's decision deepens a split among the courts of appeals over their ability to artificially limit the discretion of sentencing courts to order downward departures in "extraordinary" cases by imposing new eligibility criteria not mentioned in Guidelines, and by foreclosing consideration of factors that the Guidelines

do not prohibit. The Seventh Circuit's decision also squarely conflicts with this Court's decision in *Koon v. United States*, 518 U.S. 81 (1996).

The Court granted certiorari in *Koon* "to determine the standard of review governing appeals from a district court's decision to depart from the sentencing ranges in the Guidelines." 518 U.S. at 91. Rejecting the notion that Congress intended "to vest in appellate courts wide-ranging authority over" such decisions, *id.* at 97, the Court limited appellate courts to an abuse-of-discretion standard in reviewing departures. *Id.* at 100. This deferential standard not only "embodies the traditional exercise of discretion by a sentencing court," but takes advantage of district courts' unique institutional perspective:

> Before a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do.

Id. at 98; *cf. Buford v. United States*, 121 S. Ct. 1276, 1280 (2001) (noting that "the district court is in a better position than the appellate court to decide whether a particular set of individual circumstances demonstrates 'functional consolidation'" under the Guidelines because "a district judge

sees many more 'consolidations' than does an appellate judge" and because "factual nuance may closely guide the legal decision").

Koon repeatedly emphasized the fact-specific nature of the district court's inquiry and the impropriety of subjecting this inquiry to generalized rules. The Court recognized the need to "afford the district court the necessary flexibility to resolve questions involving multifarious, fleeting, special, narrow facts that utterly resist generalization." 518 U.S. at 99 (internal quotation marks omitted). Likewise, the Court noted that "a district court's departure decision involves the consideration of unique factors that are little susceptible . . . of useful generalization." *Id.* at 99 (internal quotation marks omitted). Indeed, "the relevant question" in deciding whether to depart is "whether the particular factor [at issue] is within the heartland *given all the facts of the case*." *Id.* at 99-100 (emphasis added). *Koon* thus accorded district courts wide latitude in deciding whether to depart from a recommended Guidelines range—which is precisely what the district court below did when it granted Petitioner a downward departure based on his advanced age and his multitude of serious medical conditions—conditions the court found would "undoubtedly" be "aggravate[d]" by his confinement, and that in "combination with each other" present "difficulties that fall outside the heartland." App., *infra*, 19a, 21a.

In departing downward under U.S.S.G. § 5H1.4, the district court here performed precisely the sort of fact-specific, comparative analysis that *Koon* contemplates. The court credited testimony outlining "at least four serious physical infirmities" and a "major depressive disorder," as well as evidence describing "the effect that prison would have on [Petitioner]" in light of these ailments. App., *infra*, 18a. Considering this evidence, the court found that "[Petitioner's] age and the number and complexity of his ailments render him unlike the 'typical' defendant who appears in this court for sentencing." *Id.* at 18a-19a. The court went on: "[Petitioner's]

health issues present an unusual profile. The conditions of confinement will undoubtedly aggravate his conditions and make treatment more difficult." *Id.* at 19a.

The Seventh Circuit overturned this decision by holding that the district court lacked any discretion to grant a downward departure based on the defendant's infirmity unless he satisfied one of three criteria that the court of appeals itself defined. The court of appeals did so, however, only by ignoring what *Koon* made plain—that district courts are uniquely positioned to recognize "unusual or exceptional" cases and must be left free to consider "all the facts of the case." *Koon*, 518 U.S. at 99-100. Far from allowing a look at "all the facts of the case," the Seventh Circuit has crafted three narrow categories—without any textual basis in the Guidelines—into which a defendant must fall to qualify for a downward departure under § 5H1.4.

According to the Seventh Circuit, to qualify for a downward departure under § 5H1.4, a defendant must either show that (1) he is completely "bedridden"; that (2) "prison medical facilities cannot cope" with the defendant's ailment; or, relatedly, that (3) "imprisonment would shorten the defendant's life span." App., *infra*, 6a-7a (internal quotation marks omitted). The first category is incredibly narrow, and the second and third limit themselves to the BOP's capacity to house and treat ailing inmates.[7] Absent one or more of these showings, however, a § 5H1.4 departure is automatically an abuse of discretion in the Seventh Circuit. The court of appeals thus implicitly rejected all other grounds for a physical-impairment departure.

The court of appeals then narrowed the discretion of the district court under § 5H1.4 even further by declaring "normal age-related features off limits as grounds for reduced

---

[7] This latter limitation has a history in the Seventh Circuit's § 5H1.4 jurisprudence. See, *e.g.*, *United States v. Albarran*, 233 F.3d 972, 979 (7th Cir. 2000); *United States v. Sherman*, 53 F.3d 782, 787 (7th Cir. 1995).

sentences." App., *infra*, 6a. Even though the Guidelines do not foreclose consideration of such "features," and regardless of the effect of such age-relate conditions on the defendant,[8/] the Seventh Circuit has prohibited district courts from considering any of these factors.

The Seventh Circuit's decision squarely conflicts with decisions of courts in other circuits that have refused to limit the discretion of sentencing courts in such a manner, and that have ordered downward departures based on the very facts and circumstances found by the sentencing court below. Courts in other circuits, for instance, have ordered downward departures where a "defendant will suffer more than the average inmate" or will be "exceptionally vulnerable to attack in prison." See *United States v. McClean*, 822 F. Supp. 961, 962 (E.D.N.Y. 1993); *United States v. Long*, 977 F.2d 1264, 1277 (8th Cir. 1992). Likewise, other circuits have recognized that advanced age may well exacerbate an illness, and age should therefore contribute to, rather than detract from, a defendant's plea for downward departure. See, *e.g.*, *United States v. Baron*, 914 F. Supp. 660, 662 (D. Mass. 1995) ("Conditions that may be relatively minor or not life-threatening in a younger person, become life-threatening in the older defendant."); *United States v. Paradies*, 14 F. Supp. 2d 1315, 1322 (N.D. Ga.-1998) ("[B]ased on his age and various infirmities, it is clear that a

---

[8/] As the court of appeals recognized, another sentencing provision, § 5H1.1, addresses defendants who are "elderly and infirm." This provision says nothing to suggest that the "infirm[ity]" cannot correlate with age, let alone that § 5H1.4's "extraordinary physical impairment" cannot be age-related. Indeed, this aspect of the Seventh Circuit's holding is of substantial importance by itself in light of the rapidly increasing number of elderly federal inmates. See Patricia S. Corwin, *Senioritis: Why Elderly Federal Inmates Are Literally Dying to Get Out of Prison*, 17 J. CONTEMP. HEALTH L. & POL'Y 687, 687 (2001) ("By 2005, the Federal Bureau of Prisons (BOP) predicts that [its] elderly inmates will increase by sixteen percent.").

thirty-three month sentence is more onerous for [Defendant] than for most defendants.").

The question presented here, however, does not ask this Court to enter the fray and define which factors may or may not be considered by a district court in granting a downward departure under a given Guideline. Rather, the question presented asks whether appellate courts have the authority, notwithstanding *Koon*, to limit the discretion of sentencing courts to consider such departure either by imposing new eligibility requirements for such departures that are not mentioned in the Guidelines, or by foreclosing consideration of factors that the Guidelines have not prohibited.

The Seventh Circuit here engaged in precisely the sort of "generalization" that this Court recognized as incompatible with the need to "afford the district court the necessary flexibility to resolve questions involving multifarious, fleeting, special, narrow facts." *Koon*, 518 U.S. at 99 (internal quotation marks omitted). The district court here did not consider any prohibited factors—*e.g.*, race or sex—in making its decision. See § 5H1.10 (setting out factors a court may not consider in sentencing). The Seventh Circuit's decision bars district courts from considering any number of *non-prohibited* factors in deciding whether a defendant's case is "extraordinary" based on all of the relevant facts and circumstances. That is flatly at odds with *Koon*. See 518 U.S. at 109 ("[A] federal court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the Commission has proscribed, as a categorical matter, consideration of the factor.").

The Seventh Circuit's decision also contravenes *Koon* by barring a district court from deciding whether a discouraged sentencing factor exists to an "extraordinary" degree by "compar[ing it] with the facts of other Guidelines cases." 518 U.S. at 98. The Seventh Circuit's narrow categories leave no room for such comparisons. According to the Seventh Circuit's

decision below, a defendant can only be eligible for a physical impairment departure if he or she fits within one of three narrow classes defined by the court of appeals, *e.g.*, where the "prison medical facilities cannot cope with" the defendant's ailment, regardless of how those ailments stack up against those of other defendants. App., *infra*, at 6a-7a. In short, by announcing a brief list of narrow eligibility criteria, the court of appeals has transformed the comparative, totality-of-the-circumstances analysis described in *Koon* into an absolute, regimented inquiry vulnerable to intrusive rethinking on appeal. The ruling also dramatically narrows the class of defendants that could be eligible for such a departure without the slightest textual basis in the Guidelines.

Contravention of this Court's decision in *Koon* is alone sufficient grounds for granting review in this case. See Sup. Ct. R. 10(c). However, the Seventh Circuit's decision also has deepened a persistent conflict among the courts of appeals over the scope of appellate review of discretionary departure decisions. Like the court of appeals in this case, the Second Circuit recently has described § 5H1.4 eligibility in extremely narrow terms. That court repeatedly has construed its decisions as limiting "extraordinary physical impairment[s]" to "medical conditions that [the] Bureau of Prisons is unable to accommodate." *United States v. Persico*, 164 F.3d 796, 806 (2d Cir. 1999) (citing *United States v. Altman*, 48 F.3d 96, 104 (2d Cir. 1995). See also *United States v. Martinez*, 207 F.3d 133, 139 (2d Cir. 2000).

Other circuits, however, afford district courts the substantial discretion that *Koon* requires. The Ninth Circuit, for instance, recognizes that the BOP's ability to treat an ailing defendant is but one of many factors that a district court may consider in deciding whether to depart under § 5H1.4: "The ability of the Bureau of Prisons to accommodate a disability is a factor which the district court may consider in making this factual finding. But it is not the only factor." *United States v. Martinez-Guerrero*, 987 F.2d 618, 620 (9th Cir. 1993) (citations omitted).

In the Ninth Circuit, unlike in the Seventh, "[a] district court may consider any number of circumstances in making its finding on the question of extraordinary physical impairment under section 5H1.4." *Ibid.*; see also *id.* at 621 (Ferguson, J., concurring) (agreeing with majority that "the district court applied the wrong legal standard by limiting its inquiry concerning extraordinary physical impairment under section 5H1.4 to whether the Bureau of Prisons can accommodate a defendant's impairment"). More broadly, the Ninth Circuit has recognized what the Seventh Circuit has not—that it is "not at liberty, after *Koon*, to create additional categories of factors that [it] deem[s] inappropriate as grounds for departure in every circumstance." *United States v. Mendoza*, 121 F.3d 510, 513 (9th Cir. 1997). In like manner, the Eighth Circuit has listed several questions a district court should ask in deciding whether to depart under § 5H1.4, but the court recognizes that these questions have no "all-purpose answer fitting every situation." *United States v. Rabins*, 63 F.3d 721, 729 (8th Cir. 1995). The Sixth Circuit also has favorably cited *Martinez-Guerrero* for the proposition that "[c]ourts may examine a wide variety of circumstances in determining whether a downward departure is warranted" for an extraordinary physical impairment. *United States v. Russell*, 156 F.3d 687, 694 (6th Cir. 1998).

Other courts of appeals likewise have refrained from limiting the grounds on which district courts can exercise their discretion to depart under § 5H1.4. The First Circuit, while acknowledging the importance of the BOP's ability to care for a defendant, recognizes that other, unspecified factors may provide bases for departure even where BOP medical facilities are adequate. See *United States v. Hilton*, 946 F.2d 955, 960 n.5 (1st Cir. 1991) ("If the condition can be adequately treated in a prison setting, *and no other countervailing considerations pertain*, then in such event, resort to section 5H1.4 . . . is not mandatory." (emphasis added)); see also *United States v. Lacy*, 99 F. Supp. 2d 108, 117-19 (D. Mass. 2000) (granting downward departure under U.S.S.G. § 5H1.4 without any

mention of BOP's ability to treat defendant). The Tenth Circuit similarly has indicated that the BOP's ability to treat an infirmity is not dispositive under § 5H1.4. In *United States v. Slater*, 971 F.2d 626, 634 (10th Cir. 1992), the court remanded for reevaluation of the defendant's denied § 5H1.4 departure request, notwithstanding the fact that his "condition [was] not so severe that prison officials [were] unable to care for him within existing facilities."

In short, confusion now pervades the federal courts over the ability of appellate courts to impose new eligibility criteria not mentioned in the Guidelines for discretionary downward departures that the Guidelines have reserved for "extraordinary" cases, and to foreclose consideration of facts and circumstances (such as age-related disorders) that the Guidelines have not prohibited. The Court should grant the petition to resolve this conflict and to bring needed clarity, consistency and fairness to the application of the Guidelines.

III. THIS CASE PRESENTS AN IMPORTANT OPPORTUNITY FOR THE COURT TO BRING NEEDED CLARITY AND CONSISTENCY TO THE APPLICATION OF THE GUIDELINES AS A WHOLE.

The issues raised in this petition transcend the facts of this case, and the application of any single guideline. They directly implicate the administration of the Sentencing Guidelines as a whole. The existence of the Sentencing Commission has allowed this Court to be "restrained and circumspect" in exercising its certiorari power over federal sentencing cases. *Braxton v. United States*, 500 U.S. 344, 348 (1991). The Court has granted certiorari in numerous cases, however, to resolve structural issues fundamental to the Guidelines' operation.

For instance, the Court has frequently ruled on the proper standard of review for various sentencing determinations. See, *e.g., Buford v. United States*, 121 S. Ct. 1276 (2001); *Koon v. United States*, 518 U.S. 81 (1996); *Williams v. United States*,

503 U.S. 193 (1992). In addition, the Court has acted to resolve conflicts implicating the Commission's power to promulgate certain Guidelines within its statutory mandate. See, *e.g.*, *United States v. LaBonte*, 520 U.S. 751 (1997); *Neal v. United States*, 516 U.S. 284 (1996); cf., *e.g.*, *Stinson v. United States*, 508 U.S. 36 (1993) (determining whether Guideline commentary is binding on judges).

The first question presented here falls into another category of sentencing cases that this Court has reviewed: those determining what *type* of proof may or must be presented at sentencing. For instance, in *United States v. Watts*, 519 U.S. 148 (1997), the Court considered whether a sentencing court may consider acquitted conduct under the Guidelines. That case warranted certiorari because it involved important issues relating to the *manner* in which the Government proves a defendant to be worthy of a particular sentence.

The Seventh Circuit's decision under § 2C1 implicates those same concerns. Under the Seventh Circuit's holding, the Government may calculate a defendant's loss/benefit under U.S.S.G. § 2F1.1 by subtracting his actual costs from a hypothetical figure—a figure that need not even accord with the proven facts of the case. This puts defendants at a massive and unfair disadvantage under the Guidelines. The Seventh Circuit rule (and the same rule in the Ninth and Eleventh Circuits) insures that many defendants, like Petitioner, can have their prison terms nearly doubled depending on the whim of the prosecutor and what hypothetical figure he picks as the point of comparison in calculating the defendant's loss/benefit. This kind of subjectivity and speculation is not only unfair to individual defendants, but it also undermines the uniformity and systematic fairness that is the *raison d'etre* of the Guidelines.

Likewise, Supreme Court review of the second question presented would equally serve to bring needed clarity to the administration of the Guidelines by clarifying the role of

appellate courts in their review of departure decisions in general, and their ability to circumscribe the discretion of district courts under *Koon*. The Sentencing Guidelines provide numerous grounds for departure, both tacit and express. The question of whether and to what extent a court of appeals may curtail district court discretion to identify "unusual" or "exceptional" circumstances warranting departure arises in the broad range of such cases. *Koon*, 518 U.S. at 98. A decision by this Court that the Seventh Circuit erred in usurping the district court's discretion—by disregarding *Koon*'s comparative, totality-of-the-circumstances test in favor of narrow eligibility requirements, and by categorically excluding certain non-prohibited factors from consideration by a sentencing court—all without any textual basis in the Guidelines, would bring courts of appeals in line with *Koon* and, in the process, unify their approach to reviewing district court sentencing departures.

* * * * *

Petitioner, a 71-year-old man in failing health, faces the prospect of a life sentence based upon a fictional loss to the U.S. Treasury and a speculative benefit he never received. The Seventh Circuit also has denied him the benefit of a substantial downward departure of his sentence by usurping the discretionary authority granted to sentencing courts in *Koon*, and imposing impossibly narrow eligibility requirements that are without basis in the Guidelines. The Court should grant his petition for a writ of certiorari to address these important and recurring issues, and to restore the even-handed application of the Guidelines that this Court contemplated in *Koon*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

LAWRENCE C. MARSHALL
357 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-7412

JAVIER H. RUBINSTEIN
Counsel of Record
MICHAEL A. SCODRO
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

JANUARY 2002

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 00-3971, 00-4066, 00-4221.

United States of America,
Plaintiff-Appellee, Cross-Appellant,

v.

Robert R. Krilich, Sr.,
Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 94 CR 419 —David H. Coar, *Judge*.

Submitted March 10, 2001.*
Decided July 16, 2001.

EASTERBROOK, RIPPLE, and EVANS, Circuit Judges.

EASTERBROOK, Circuit Judge.

---

* These cross-appeals have been submitted under Operating Procedure 6(b) to the panel that decided prior appeals in the case. The panel has concluded that additional oral argument is unnecessary.

Robert Krilich's criminal case is on appeal for a third time. He has been convicted of racketeering and other offenses related to a scheme that included bribery of public officials in order to obtain assistance in the approval and financing of construction projects. In 1998 we affirmed Krilich's convictions but on the United States' cross-appeal remanded for resentencing. *See United States v. Krilich*, 159 F.3d 1020 (7th Cir. 1998). *See also United States v. Krilich*, 178 F.3d 859 (7th Cir. 1999) (reversing an order releasing Krilich on bail). Krilich's original sentence was 64 months' imprisonment. On remand the district court imposed a sentence of 87 months. Once again, both sides complain.

What occasioned the remand is a dispute about the application of the table in U.S.S.G. § 2F1.1(b)(1) to add levels to the calculation of Krilich's offense severity. One aspect of Krilich's offense was co-opting a local government to sponsor tax-free industrial revenue bonds, some proceeds of which were used to finance a project (and other proceeds of which were diverted to Krilich's personal benefit). The prosecutor argued that the gain to Krilich from this offense should be measured by the difference between what he paid in interest on the bonds, and the higher payments that would have been necessary had the interest been taxable to the investors (as it should have been). The district judge did not resolve the parties' dispute about valuation, ruling instead that no matter how the matter came out he would allow only seven levels from this table, departing on the authority of Application Note 7(b) to § 2F1.1. (This has become Note 8(b) in the latest version of the Guidelines, but we use the former numbering for consistency with our prior opinions.) We held that this procedure was unauthorized and remanded for the imposition of a sentence based on the table in § 2F1.1(b)(1). 159 F.3d at 1029-31. Although downward departure could not be excluded as a

possibility, we held, the procedure must start with an accurate calculation.

A different district judge imposed sentence on remand. After a hearing that lasted almost three weeks, the court concluded that the gain Krilich had reaped by offering tax-free bonds (and correspondingly the loss to the Treasury) was approximately $14 million, which added 15 offense levels under the table in § 2F1.1. This produced a total offense level of 32 and a presumptive sentencing range of 135 to 168 months' imprisonment. The judge concluded that the offense level of 32 did not "significantly overstate" the seriousness of Krilich's crime, and the court therefore held that departure under Application Note 7(b) is unwarranted. Nonetheless, the court granted Krilich a significant downward departure of five offense levels for health reasons. The level 27 sentencing range is 78-97 months, and the district judge chose a sentence in the middle of that range. Krilich contends that his sentence is too high, the United States that it is too low.

Krilich contests every aspect of the district court's findings. His principal contention is that the $14 million figure for his gain (and the Treasury's loss) is flawed because it supposes that he would have raised the same amount of money with taxable bonds had he lacked access to tax-free instruments. Higher interest rates could have led to a change of plans, for demand curves slope downward and an increase in the price of one project leads an entrepreneur like Krilich to shift to another. That much cannot be denied, but the Guidelines do not determine a wrongdoer's gain based on what-if scenarios. Imagine a bank robber who argues that, had he known about the presence of a guard, he would have robbed a grocery store instead and thus caused a lower loss. It is hard enough to tote up the gains and losses from crimes actually committed without pursuing second-best solutions, which are usually

indeterminate. The gain and loss rules in the Guidelines call for approximations, not exact figures. See § 2F1.1 Application Note 8 (now Note 9). Krilich did get access to tax-free bonds, raising $135 million that he held for 12 years. Some of this money he used for construction or consumption, and the rest he reinvested at higher interest. A similar kitty lent by investors who had to pay taxes on interest would have cost Krilich much more than what he actually paid in interest. Under the Guidelines the buck stops there. The district court's finding that the gain was $14 million is supported by the record (which includes the calculations of an expert in finance) and cannot be called a clear error. None of Krilich's other objections to the conclusion that his gain exceeds $10 million is persuasive; we see no need to add to the district court's analysis. And Krilich's contention that the district court should have departed under Application Note 7(b) goes nowhere; the judge understood the existence of (and limits on) that authority, and the decision that this is not an appropriate occasion for departure cannot be reviewed by this court. *United States v. Franz*, 886 F.2d 973 (7th Cir. 1989).

At the time of the resentencing hearing early in 2000, Krilich was 69 years old and had age-related medical problems. The district court concluded, on the basis of a psychiatrist's testimony (yes, a psychiatrist; no cardiologist testified), that Krilich has four physical infirmities: chronic cardiovascular disease, chronic peripheral vascular disease with hypertension, obstructive pulmonary disease, and lower back pain of lumbar and lumbosacral origin. The court gave Krilich a one-level departure for each of these four, and a fifth level for the four in combination.

The United States' argument that consideration of this subject was barred by the terms of our remand is not correct. The district court found that Krilich's medical condition had

deteriorated since his original sentencing, and changed circumstances are a standard reason for consideration of additional issues on a remand. See *United States v. Buckley*, 251 F.3d 668 (7th Cir. 2001). It remains necessary, however, to determine whether the district judge abused his discretion.

The judge acknowledged that none of the four physical problems would justify a departure standing alone but believed that the combination does so:

> I specifically do not find that . . . the Bureau of Prisons is unable to adequately treat the defendant's ailments. Nevertheless, contrary to the government's position, the defendant presented a medical profile outside the heartland of people remanded to the custody of the Bureau of Prisons. . . . Krilich's health issues present an unusual profile. The conditions of confinement will undoubtedly aggravate his conditions and make treatment more difficult. Therefore, a departure is warranted. . . . [These conditions create] treatment and quality of life difficulties that fall outside the heartland.

The judge reached this conclusion despite finding that "there is no structural reason why Krilich cannot receive adequate care within the [Bureau of Prisons]." Ten months after announcing the 87-month sentence, the district court held another hearing at which Krilich argued, with the support of two cardiologists (neither of whom had examined him or was familiar with the medical care available in federal prisons), that an even greater departure was warranted. This hearing was unauthorized, because the district judge no longer had the authority to alter Krilich's sentence, see 18 U.S.C. § 3582(c) and Fed. R. Crim. P. 35, but was harmless, for the judge ultimately concluded that the cardiologists had added nothing to what was already in the record.

Relying on U.S.S.G. § 5H1.4, the United States contends that an "unusual [medical] profile" is not a valid ground for departure. Section 5H1.1 says that age may not be the basis of departure unless the defendant is "elderly and infirm," referring for further guidance to § 5H1.4, which provides:

> Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. However, an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range; *e.g.*, in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

Does Krilich have an "extraordinary physical impairment"? Is he "elderly and infirm" or "seriously infirm"? The district court did not find so; instead the judge apparently believed that any "unusual" medical condition or combination of conditions justifies a departure. That can't be reconciled with the first sentence of § 5H1.4. "Extraordinary" is a subset of "unusual." We have held that the limit to "extraordinary" conditions must be taken seriously. See *United States v. Woody*, 55 F.3d 1257, 1275-76 & n.15 (7th Cir. 1995).

Almost everyone is "unusual" in some respect, and many septuagenarians have conditions similar to Krilich's. Yet § 5H1.1 and § 5H1.4 put normal age-related features off limits as grounds for reduced sentences. Older criminals do not receive sentencing discounts. Many persons in poor health are confined in federal prisons. If the medical problem is extraordinary in the sense that prison medical facilities cannot cope with it, then a departure may be appropriate. See *United States v. Sherman*, 53 F.3d 782, 787 (7th Cir. 1995). To justify such a conclusion, however, the court "must ascertain, through

competent medical testimony, that the defendant needs constant medical care, or that the care he does need will not be available to him should he be incarcerated." *United States v. Albarron*, 233 F.3d 972, 978 (7th Cir. 2000). Or a bedridden person would be as effectively imprisoned at home as in a jail; the physical condition itself does the imprisoning. But the district court found that the Bureau of Prisons could treat Krilich's conditions, and he is not bedridden, so these rationales for departure are missing.

An ailment also might usefully be called "extraordinary" if it is substantially more dangerous for prisoners than nonprisoners. Then imprisonment would shorten the defendant's life span, making a given term a more harsh punishment than the same term for a healthy person. A district court properly may reduce the sentence's *length* when necessary to equalize *severity*. See *United States v. Gee*, 226 F.3d 885, 902 (7th Cir. 2000). Cf. *United States v. Guzman*, 236 F.3d 830 (7th Cir. 2001). The district judge not only did not make such a finding for Krilich but also believed that this finding could not be sustained. Approximately 4,000 persons in federal custody receive care for cardiovascular conditions, and no evidence of record demonstrates that they exhibit greater mortality than free persons with these conditions.

The Bureau of Prisons can provide Krilich with the medical regimen (which is to say, the drugs and diet) that his physicians believe to be appropriate. That the Bureau has not provided (and does not propose to provide) the quality of care that top private specialists provide is neither here nor there; wealthy defendants can afford exceptional care, but this does not curtail the punishment for their crimes. Krilich did not establish that his condition is either "debilitating" or "extraordinary," and a departure therefore conflicts with norms established by § 5H1.1 and § 5H1.4. A generic statement that a defendant's

circumstances are out of the "heartland" may not be used to override limitations written into the Guidelines. See *Koon v. United States*, 518 U.S. 81, 92-96 (1996); *Krilich*, 159 F.3d at 1030. Krilich's sentence therefore is again vacated, and the case is remanded with instructions to impose a sentence in the range of 135 to 168 months.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 00-3971, 00-4066, 00-4221.

United States of America,
Plaintiff-Appellee, Cross-Appellant,

v.

Robert R. Krilich, Sr.,
Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 94 CR 419 —David H. Coar, *Judge*.

August 13, 2001.

Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. TERENCE T. EVANS, Circuit Judge

Order

Defendant-appellant, cross-appellee filed a petition for rehearing and rehearing en banc on July 30, 2001. No judge in regular active service has requested a vote on the petition for

rehearing en banc,* and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

---

* Judge Williams did not take part in the consideration of the petition for rehearing en banc.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States of America	)	
	)	
	)	No. 94 CR 419
v.	)	
	)	Honorable
	)	David H. Coar
Robert S. Krilich, Sr.	)	
	)	

MEMORANDUM OPINION

Defendant Robert S. Krilich, Sr. is before this Court for sentencing. For the reasons stated below, this Court sentences Krilich and commits him to the Bureau of Prisons for a term of 87 months to be followed by three years supervised release.

Background

Krilich was convicted of fourteen counts of fraud under 18 U.S.C. § 1014, and conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(d). On June 23, 1997, Judge Grady sentenced Krilich to sixty-four months in prison. Krilich appealed both his conviction and his sentence and the United States cross-appealed his sentence. On October 27, 1998, the United States Court of Appeals for the Seventh Circuit affirmed Krilich's convictions but vacated Judge Grady's sentencing order and remanded the case for re-sentencing. On October 8, 1999, Krilich's case was reassigned to this Court pursuant to Local General Rule 2.30F.

According to the Seventh Circuit, this Court was to consider on remand the revenue that Krilich's bribery scheme[1] caused the Internal Revenue Service to lose. *See United States v. Krilich*, 159 F.3d 1020, 1031 (7th Cir. 1999) ("the existence of a substantial tax loss is undeniable"). Additionally, the Seventh Circuit stated that this Court "should give no weight to . . . the disparity between Krilich's presumptive sentence under § 2F1.1 and [the bribee,] Mayor Sarallo's actual sentence." *Id.* at 1031. Beginning on January 28, 2000, this Court heard expert testimony to undertake calculation of the tax loss to the government, despite the Seventh Circuit's implication that a precise calculation would be difficult. *Id.* ("[c]alculating the actual loss in tax revenues from providing investors with a tax shield that the law does not allow is quite complex . . . .")

The government presented testimony from David Joseph Ross, who is a senior vice president of a consulting firm specializing in economic analysis of a variety of legal and regulatory matters. Ross calculated both the benefit that Krilich would have received from being able to borrow at a tax-free interest rate and the loss that the United States Treasury would have suffered had Krilich been able to borrow at a tax-free interest rate. Assuming that the bonds were tax-free, Ross concluded that both the benefit to Krilich and the loss to the government would be about $14.2 million. Crediting and relying only on the estimated actual loss to the government from lost tax revenue (as opposed to the benefit to Krilich), this Court announced Krilich's sentence and indicated that a written order would be forthcoming.

Before this Court issued its written statement of reasons, the Internal Revenue Service issued an adverse determination with

---

[1] Bribery was one of the predicate acts for Krilich's RICO conspiracy conviction.

respect to the bonds at issue in this case. The IRS found that the interest on the bonds was not tax free as originally intended. Krilich subsequently moved to set aside this Court's oral ruling regarding tax loss. According to Krilich, since the IRS determined that the bond interest was taxable, the underlying premise for his sentence enhancement -- a tax loss of $14.2 million — ceased to exist. Krilich filed a memorandum in support of his motion to which the government filed a response and to which Krilich, in turn, filed a reply. For the reasons stated below, this Court's initial determination of Krilich's sentence retrains the same, albeit for slightly different reasons.

Analysis

"Because the underlying conduct for [Krilich's] RICO conviction was bribery, the relevant [sentencing] guideline is § 2C1.1(b)(2)(A)." *Krilich*, 159 F.3d at 1029. That section provides that "if the value of . . . the loss to the government from the offense . . . exceed[s] $2,000, [the offense level will] increase by the corresponding number of levels from the table in § 2F1.1" U.S. Sentencing Guidelines Manual § 2C1.1(b)(2)(A). The table set forth in Section 2F1.1 varies the sentencing range . . . depending on the amount of loss." *United States v. Lauer*, 148 F.3d 766, 767 (7th Cir. 1998). A loss greater than $10,000,000, increases the offense level by fifteen levels. *See* U.S. Sentencing Guidelines Manual § 2F1.1(b)(1)(P). The loss mentioned in Section 2F1.1 can be either an actual loss or an intended loss, whichever is greater. *Id.* (citing § 2F1.1, Application Note 7) (further citations omitted). An intended loss is measured by the amount that the defendant put at risk. *See Lauer*, 148 F.3d at 768. Intended loss is not mitigated by a defendant's hope that the victimized party not actually be harmed. *See id.*

Loss to the Government

To calculate the actual loss to the government, the government's expert collected data and compared interest rates on tax-free debt instruments and taxable debt instruments that were otherwise equivalent. The data indicated the difference between the rates demanded for investment in taxable as opposed to tax-free securities. Based on the data, Ross estimated the interest rate that Krilich would have had to pay if he had been unable to obtain tax-free bonds to finance the project.

Because tax-free bonds financed the project, the investors did not pay taxes to the United States Treasury on the interest that they received. Conversely, if the interest on the bonds had not been tax free, the investors would have had to pay taxes on the interest received. Therefore, the United States lost the benefit of the taxes it would have received but for the fact of the improper attempt at tax-free financing. Applying the interest data previously discussed, Ross concluded that between 1986 and 1991, the loss to the government, assuming a 28% marginal tax rate for investors, would have been $16.5 million. Using the average marginal tax rate for all United States taxpayers, the loss would have amounted to $14.2 million. This Court credited Ross's testimony and found that the government suffered a loss of $14.2 million.

As noted above, after this Court's hearing on actual tax loss and after the oral ruling, the IRS determined that the interest on the bonds in question was taxable. In other words, the "actual loss" estimated by the government's expert was no longer an actual loss. The interest on the bonds turned out to be taxable, not tax-free as intended. The absence of an actual loss of $14.2 million, however, does not save the day for Krilich because he intended the government to lose that revenue. In the parlance

of the *Lauer* case, Krilich put $14.2 million "at risk" through his bribery scheme. *See Lauer*, 148 F.3d at 768.[2] Even though Krilich's bribery scheme did not result in the issuance of tax-free bonds, he intended to have tax-free bonds issued. Indeed, this was the ultimate goal of Krilich's bribe. At bottom, if things had turned out as Krilich had planned, the tax-free bonds would have been issued and the government would be deprived of $14.2 million in tax revenue. This intended loss is no less tied to Krilich's bribery scheme than the actual loss that would have befallen the government.[3]

Krilich counters both the loss and the gain calculations by positing that the project actually undertaken through the tax-free financing was not economically feasible at taxable (higher) interest rates. Krilich therefore concludes that Ross' comparisons between taxable financing and tax-free financing is illusory. In support of his theory, Krilich does not offer a single "fact." Instead, he relies on the testimony of Stan Lazar, an expert in real estate accounting (not real estate finance). Lazar opined that Industrial Revenue Bond Financing is used to create incentives for builders to undertake projects that otherwise would not be built. Neither Krilich nor Lazar, however, offered any support for this sweeping statement. This Court is unwilling to conclude that the mere fact that a condition of financing was that 20% of the project be devoted to low income housing renders the project economically unsound. It is at least equally plausible that Internal Revenue

---

[2] Ross's analysis regarding the actual tax-revenue loss to the government is equally valid with respect to intended loss. In hindsight, Ross's calculations just turned out to be hypothetical estimates of what the government would have lost.

[3] Because the Court determines that Krilich intended that the government lose $14.2 million in revenue, it is not necessary to address the government's waiver argument.

Bond financing was obtained (by way of bribe) to increase the profits from an already viable project simply because of greed. It would have been relatively simple for Krilich to reconstruct the financial analysis of the project and compare the projected results of alternative financing to counter Ross' assumptions. Absent other evidence, the Court rejects Krilich's unsupported analysis because Ross' approach is reasonable.

Krilich also argues that he received no net benefit from the proceeds of the financing. Relying on Application Note 2 to Guideline 2C1.1, Krilich argues that where a contract is awarded in return for a bribe, the measure of net benefit is the defendant's profit on the contract. Krilich states further that there was no profit on the contract. He asserts that there was a loss. The Court reluctantly concludes that Krilich may be correct on this latter factual point, but notes that it is legally irrelevant.[4] Since Krilich's offense conduct was *intended* to cause the government a $14.2 million loss, that amount will be used for applying §2F1.1.

The Court finally rejects Krilich's argument that the "intended loss" doctrine is inapplicable in this case. Krilich analogizes to cases involving fraudulent loan applications and fraudulent contract procurement. Such analogies are not applicable here. In fraudulent loan applications and fraudulent contact procurement cases, an exception is made under the intended

---

[4] This Court's reluctance stems from a lingering doubt as to whether the "contract" obtained in return for the bribe is limited to the tax-free financing or, as he suggests, encompasses the entire building project. Moreover, Krilich's evidence of detriment (offsetting any benefit he enjoyed) includes several questionable items such as: $2.5 million or more for criminal defense counsel and incarceration-related matters, the $5 million in personal funds for the purchase of the subseries I bonds (without offsetting that amount by the value of the 26 completed townhouses), and allocation of office and maintenance expenses to the Oakbrook Terrace Project.

loss doctrine for fraudfeasors who intend to perform under the contractor loan. *See, e.g., United States v. Schneider*, 930 F.2d 555, 558 (7th Cir. 1991). This exception exists because these fraudfeasors do not actually intend to cause a loss to the government equal to the amount of the loan or the value of the contract. Quite the contrary, these fraudfeasors hope to repay the full loan or perform the full value of the contract. *See, e.g., id.* In stark contrast to these cases, Krilich intended to cause the government a tax loss of approximately $14.2 million despite his attempt to and intention to "perform" under the contract obtained as a result of his bribe to Mayor Sarallo. Unlike the loan or contract procurement cases, Krilich's intent throughout was to have tax-free bonds issue to finance his project. Tax-free bonds would have deprived the government of revenue that could have otherwise been collected by taxing the interest on taxable bonds.

The parties do not dispute that prior to any consideration of departure, Krilich's base offense level is 17. Since the Court determines that Krilich intended the government to suffer a $14.2 million tax loss, the pre-departure base level is increased 15 levels to 32.

Departure Based on Krilich's Medical Condition

Krilich also moves for downward departure on the basis of his medical and psychological conditions. Dr. Richard Herbert, who is no longer engaged in active practice, testified that Krilich was a patient of his before Krilich's incarceration and that he saw Krilich a number of times before his incarceration. On cross examination, Dr. Herbert acknowledged that he had not been listed as one of Krilich's treating physicians on forms that Krilich executed upon entry into the custody of the Bureau of Prisons. Additionally, Dr. Herbert stated that he treated Krilich several times "to the extent that I had access to him. He

. . . came to my office. I offered treatment and I gave him advice what should be done." Tr. Proceedings Feb. 1, 2000 at 283-84. Dr. Herbert had no records of Krilich's visits, and never did a complete history of Krilich. Dr. Herbert has no particular expertise in the field of cardiology, but this did not deter him from expressing numerous opinions about Krilich's heart condition(s) and the care provided, or not provided, by the Bureau of Prisons. This Court gives no weight to Dr. Herbert's testimony.

Dr. Bernard Rubin is a psychiatrist who testified that Krilich is suffering from at least four serious physical infirmities: (1) chronic cardiovascular disease; (2) chronic peripheral vascular disease with hypertension; (3) obstructive pulmonary disease; and (4) back disease of lumbar and lumbosacral origin. According to Dr. Rubin, Krilich also suffers from a major depressive disorder, characterized by insomnia, anorexia, "distractability", hopelessness, suicidal thinking and tearfulness. The supplement to the Presentence Investigation Report also sets out the medical conditions that Mr. Krilich suffers from and the medications he is receiving.

Dr. Rubin also opined as to the effect that prison would have on Krilich. Dr. Rubin believes that there are three difficulties with treatment of physical or psychological problems in prison: (1) prisons are organized punishment; (2) they are organized for security; and (3) medical, surgical and psychological concerns are secondary. Therefore, he concludes that Krilich's various conditions can best be addressed outside of an institutional setting.

The Government argues that because many of Krilich ailments are chronic and because he would suffer from them whether or not he was incarcerated, no departure is warranted. The Court disagrees. Krilich's age and the number and

complexity of his ailments render him unlike the "typical" defendant who appears in this court for sentencing. While this Court is aware that the mandatory minimum requirements of the Sentencing Guidelines have created an increased need to provide geriatric treatment for inmates, Krilich's health issues present an unusual profile. The conditions of confinement will undoubtedly aggravate his conditions and make treatment more difficult. Therefore, a departure is warranted. The question, therefore, is the level of departure.

Krilich argues for a substantial departure to a level that would require his immediate release on the theory that treatment of his aliments by the Bureau of Prisons has been inadequate. The issue, however, is whether the Bureau of Prisons is incapable of providing medically reasonable treatment to Krilich. While the manner in which he has been treated in the past is some indication of standards within the Bureau of Prisons and therefore somewhat predictive of future treatment, the issue is broader than whether doctors hired by Krilich would have treated his conditions differently.

This Court has no doubt that a person of Krilich's means could obtain first class medical and psychological treatment outside of a prison environment and will assume, without deciding, that the treatment that Krilich could receive outside of prison would be superior to the treatment he is receiving from the Bureau of Prisons. The Court cannot, however, conclude that the treatment that Krilich has received and which he is likely to receive in the future from the Bureau of Prisons is so lacking in quality that this Court should depart to a level that requires his immediate release, or to a level at which some alternative to imprisonment would be available. Unfortunately, Krilich has approached the question of departure as an all or nothing proposition. The focus of his proofs and arguments has been an all out assault on continued confinement. He has

attempted to show that the BOP has not and will not adequately treat his medical and psychological conditions and therefore the court should depart to level that will allow some form of home detention which permit treatment by his personal treaters. In his single-minded thrust to avoid further incarceration, Krilich has neglected to provide the court with information necessary to readily determine an appropriate departure that takes into account his conditions, measured by the particular manner in which they impose upon him hardships outside of the heartland. Moreover, the guidelines themselves provide little textual guidance in determining the extent of downward departures.

§5H1.4 of the Guidelines provides that while physical condition (of a defendant) is not "ordinarily relevant" in determining whether a departure is warranted, "an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range." The example contained in the guideline refers to a defendant who is so seriously ill or infirm that "home detention may be as efficient as, and less costly than, imprisonment." There is no question but that a sentence that would have Krilich pay the cost for treatment of his various ailments would be less costly to the government. It is unclear whether such a sentence would be more "efficient" than a period of imprisonment. If efficiency in this content refers to the possibility that the Bureau of Prisons lacked the ability to treat the defendant in a BOP facility and would have to transport the defendant to a location with the attendant travel and security costs, then there is no showing that the Krilich's circumstances warrant such an approach. If the term is to be read more expansively, taking into account the broad goals of sentencing (See 18 U.S.C. §3553(a)(2)), it is clear that those goals are not served by departing to a level where Krilich escapes a substantial prison term. Neither his physical condition nor the ends of sentencing are served by such a result.

Krilich stands convicted if serious crimes which deserve a serious sanction. The fact that he suffers significant medical ailments serves as a reason to mitigate the punishment, not to eliminate it.

None of Krilich's four major illnesses (cardiovascular disease, peripheral vascular disease with hypertension, obstructive pulmonary disease and back disease/lumbar and lumbosacral origin), taken alone, justify a departure. In combination with each other, they present treatment and quality of life difficulties that fall outside the heartland. The court will therefore depart one level for each of the four conditions and an additional level for the interaction of the ailments.

Departure Based on Sentencing Disparity

Krilich also sought a departure based on the argument that the loss amount overstates the seriousness of his conduct. Intertwined within this argument is Krilich's argument of sentencing disparity. According to Krilich, he was seduced into paying the bribe by Mayor Sarallo's officials who were "on the make." These officials received sentences much less severe than that which is called for under the Guidelines for Krilich. Krilich's argument in this regard is exceptionally misguided. While wise enough not to argue that Judge Grady's earlier ruling is the law of the case, Krilich foolishly argues that this departure determination is "certainly entitled to great weight." Krilich's argument amazingly ignores Seventh Circuit precedent that could not be more on point — namely, the appellate opinion in this case, expressly reversing the decision that Krilich asks this Court to adopt here. *See United States v. Krilich*, 159 F.3d 1020, 1021-22 (7th Cir. 1998). The Seventh Circuit could not have more clearly precluded such consideration. *Id.* ("on remand the Judge should give no weight to . . . the disparity between Krilich's presumptive sentence

under §2F1.1 and Mayor Sarallo's actual sentence . . . .") In addition, as the Government notes, Krilich has not argued on remand that the Guidelines were misapplied in either his or Sarallo's case. The request to depart further is denied.

CONCLUSION

For the foregoing reasons, this Court sentences Robert S. Krilich, Sr. and commits him to the Bureau of Prisons for a term of 87 months to be followed by three years supervised release.

DATE: November 1, 2000

ENTER:

DAVID H. COAR,

U.S. DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States of America	)	
	)	
	)	No. 94 CR 419
v.	)	
	)	Honorable
Robert S. Krilich, Sr.	)	David H. Coar
	)	

MEMORANDUM OPINION & ORDER

On November 1, 2000, this Court sentenced defendant Robert Krilich to eighty-seven months confinement in a federal prison and issued a statement of reasons for that order. Krilich now moves under Federal Rule of Criminal Procedure 35(c), to correct or reduce his sentence. For the reasons stated below, this motion is DENIED.

Background

Krilich was convicted of fourteen counts of fraud under 18 U.S.C. § 1014, and conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(d). On June 23, 1997, Judge Grady sentenced Krilich to sixty-four months in prison. Krilich appealed both his conviction and his sentence and the United States cross-appealed his sentence. On October 27, 1998, the United States Court of Appeals for the Seventh Circuit affirmed Krilich's convictions but vacated Judge Grady's sentencing order and remanded the case for re-sentencing. On October 8, 1999, Krilich's case was reassigned to this Court pursuant to Local General Rule 2.30F.

This Court originally stated that it would rely on the actual loss to the government as the basis for Krilich's sentence on remand, as the Court of Appeals for the Seventh Circuit had directed in *United States v. Krilich*, 159 F.3d 1020, 1031 (7th Cir. 1998). Before this Court issued its written statement of reasons, the Internal Revenue Service issued an adverse determination with respect to the bonds at issue in this case. The IRS found that the interest on the bonds was not tax free as originally intended. Krilich subsequently moved to set aside this Court's oral ruling regarding tax loss. In the November 1, 2000, memorandum opinion, this Court relied primarily on the "intended loss" to the government as the basis for Krilich's sentence. Now, Krilich argues that the relevant guideline — the one that was in place when Krilich committed his crime — does not permit this Court to consider the loss to the government as a basis for enhancing the base offense level.

Analysis

Krilich's motion is denied because the benefit to him, like the intended loss to the government, is also greater than $10 million. In this motion, even Krilich acknowledges that the benefit to him is a basis for enhancing his sentence. The Seventh Circuit recognized in its opinion that there is a correlation between Krilich's gain and the government's loss, albeit not an exact correlation. *See Krilich*, 159 F.3d at 1031. Of more significance here, though, is the testimony of David Joseph Ross, who is the government's finance expert. As noted in this Court's previous opinion, Ross testified that:

> both the benefit that Krilich would have received from being able to borrow at a tax-free interest rate and the loss that the United States Treasury would have suffered had Krilich been able to borrow at a tax-free interest rate . . . would be about $14.2 million.

Mem. Opinion, Nov. 1, 2000, at 2.[1] In response to Krilich's objections to Ross's opinion, this Court also noted that "Krilich d[id] not offer a single fact" to rebut that opinion. *Id.* at 5. Krilich has not presented this Court with anything that would alter that original conclusion. Krilich makes too much of the fact that, in the original memorandum opinion, this Court "reluctantly conclude[d] that Krilich may be correct" that he ultimately lost money on the project. As noted in footnote four of that opinion, this Court doubted the propriety of many of the so-called "deductions" that Krilich used to conclude that he had actually suffered a loss. At bottom, Ross's testimony provides a more substantial basis for determining the benefit and persuades this Court that the benefit to Krilich was approximately $14 million.

In view of Ross's factually uncontradicted opinion, this Court again concludes that the benefit to Krilich exceeded $10 million and that on the basis of either the benefit to him or the intended loss to the government, the sentence enhancement remains the same.

CONCLUSION

For the foregoing reasons, Krilich's motion is DENIED.

ENTER:

DAVID H. COAR,
U.S. DISTRICT COURT JUDGE
[Nov. 13, 2000]

---

[1] Ross actually estimated the *benefit* to Krilich as $14.6 million. *See* Tr. of Proceeding, January 28, 2000, at 23.